

DEPARTMENT OF CONSUMER AFFAIRS

BOARD OF REGISTERED NURSING

INITIAL STATEMENT OF REASONS

Hearing Date: June 15, 2011

Subject Matter of Proposed Regulations: Disciplinary Guidelines and Uniform Standards related to Substance Abuse

Section Affected: 16 CCR § 1444.5

Introduction

On June 30, 2008, the Medical Board of California was scheduled to sunset its Diversion Program and reverted to disciplinary action as the only means of addressing physicians with substance abuse problems. The sunset was primarily due to the program's failure of its fifth audit, conducted by the Center for Public Interest Law (the Medical Board's Enforcement Monitor), for overall ineffectiveness, lack of standards and failure to protect the public from harm. At the same time, there was extensive media coverage citing deficiencies in the Medical Board's Diversion Program, including patients harmed by physicians who continued to practice even after testing positive for drugs. On January 24, 2008, with the sunset of its Diversion Program imminent, the Medical Board held a Diversion Summit to discuss other options for physicians with substance abuse problems.

On March 10, 2008, the Senate Business, Professions and Economic Development Committee (Senate Committee) held a hearing to review physicians' and health practitioners' substance abuse programs. The resulting legislation, authored by the Senate Committee's Chair, Senator Ridley-Thomas, was SB 1441: Healing arts practitioners: substance abuse (Chapter. 548, Statutes of 2008)

In September 2008, SB 1441 was signed into law. The Legislature declared that substance abuse monitoring programs, particularly for health care professionals, must operate with the highest level of integrity and consistency. Patient protection is paramount. The legislation, in part, mandated that the Department of Consumer Affairs (Department) establish a Substance Abuse Coordination Committee (Committee) subject to the Bagley-Keene Open Meeting Act and comprised of the Executive Officers of the Department's healing arts boards, a representative of the California Department of Alcohol and Drug Programs, and chaired by the Director of the Department. The Committee was charged with developing consistent and uniform standards and best practices in sixteen specific areas for use in dealing with substance abusing licensees, whether or not a board chooses to have a formal diversion program. The Department is committed to ensuring that licensees who are confirmed

to be abusing drugs and/or alcohol, and who pose a risk to the public, are not diverted from an enforcement action or public disclosure of that action. The Department is also committed to ensuring that licensees who have undergone treatment and have made steps towards recovery can safely return to practice. The Committee has developed 16 uniform standards as required by SB 1441. The board is proposing to implement those uniform standards in its Disciplinary Guidelines through the regulatory process.

Specific Purpose of Proposed Regulations

The board proposes to amend and update its Disciplinary Guidelines to include uniform standards related to substance abuse reflecting changes in current law and the current probationary environment, clarify existing language and make technical changes. The current Disciplinary Guidelines referenced in the regulation (October 2002) will be updated as of February 2011.

Factual Basis

Business and Professions (B&P) Code Section 2708.1 requires that protection of the public is the highest priority for the board in exercising its licensing, regulatory and disciplinary functions.

B&P Code Section 2761 allows the board, among other things, to place a license on probation with terms and conditions.

B&P Code Section 2570.28 allows the board to deny or discipline a licensee for, among other things, unprofessional conduct, which includes incompetence or gross negligence in carrying out usual certified or licensed nursing functions. B&P Code Section 2762 also defines unprofessional conduct as including specified drug-related transgression, e.g., unlawful use or possession of any dangerous drugs or devices or alcoholic beverages.

The board proposes to add specified uniform standards related to substance abuse by incorporating them by reference into their regulations. It would also update its existing standard and optional terms of probation. The following describes those uniform standards the board is adding, including the update of its Disciplinary Guidelines and other clarifying and minor changes.

Section 1444.5 would be amended as follows:

- Incorporate by reference the new guidelines entitled "Recommended Guidelines for Disciplinary Orders and Conditions of Probation" (2/11);
- Specify that the disciplinary guidelines apply to all disciplinary matters; the uniform standards are required mandatory consequences that apply to an applicant or licensee who has a substance abuse disorder;

- Add language to clarify that an Administrative Law Judge may not impose any conditions or terms of probation that are less restrictive than the uniform standards related to substance abuse where an applicant or licensee has a substance abuse disorder.

Disciplinary Guidelines

Title Page

Change the revision date on the title page from October 2002 to February 2011.

Uniform Standards

The board is adding the following uniform standards. Discussion follows each bulleted standard that the board proposes to adopt.

1. Clinical Diagnostic Evaluations.

In order to comply with the SB 1441 uniform standards, the board proposes to require that if a licensee is ordered to undergo a clinical diagnostic evaluation, the evaluation must be conducted by a licensed practitioner who holds a valid, unrestricted license to conduct clinical diagnostic evaluations, has three (3) years' experience in providing evaluations of health care professionals with substance abuse disorders and is approved by the board. The evaluations are to be conducted in accordance with acceptable professional standards for conducting substance abuse clinical diagnostic evaluations.

Discussion

A clinical diagnostic evaluation would not be necessary in a situation where there is demonstrable immediate threat to the public safety and/or where violations are so egregious (e.g. crimes in addition to substance abuse, harm/death of a patient) that the board would not allow the licensee to practice under any circumstances; thus, the board would seek revocation instead of permitting rehabilitation/treatment.

This standard would increase consumer protection by:

- Specifying requirements for a clinical diagnostic evaluation of the licensee, required qualifications for the providers evaluating the licensee, and timeframes for completion of the clinical diagnostic evaluation.
- Ensuring that the board is notified quickly if the licensee is a threat to himself/herself or the public while allowing for due process.
- Setting forth minimum standards for clinical diagnostic evaluations and ensures evaluations are conducted in accordance with applicable best practices, while allowing the evaluator the discretion to determine and use the most appropriate tool in assessing the licensee.

- Providing the board with a professional opinion as to whether the licensee has a substance abuse problem, and whether the licensee is a threat to himself/herself or others.
- Prohibiting personal, financial and business relationships between the evaluator and licensee, thereby ensuring objectivity in assessments.

By specifying that the board be provided with expert recommendations for treatment and practice restrictions, the standard also ensures that licensees who have undergone treatment and have made steps towards recovery can safely return to practice.

2. Clinical Diagnostic Evaluation Report.

In order to comply with the SB 1441 uniform standards, the board proposes to require what the Clinical Diagnostic Evaluation Report (Report) would contain, including but not limited to, the evaluator's opinion, whether the licensee has a substance abuse problem and recommendations for substance abuse treatment. The board also proposes to require that (1) the evaluator not have a financial, personal or business relationship with the licensee in the last five years; (2) if the evaluator determines during the process that a licensee is a threat to him/herself or others, the evaluator is to notify the board with 24 hours of such a determination; (3) the final written Report is to be provided to the board no later than 10 days from the date the evaluator is assigned the matter unless the evaluator requests additional information to complete the evaluation, not to exceed 30 days.

In addition, the board proposes to require that the board review the evaluation to determine whether or not the licensee is safe to return to either part-time or full-time practice and what restrictions or recommendations should be imposed on the licensee based on the specified criteria that includes, but is not limited to, license type, licensee's history, documented length of sobriety, scope and pattern of substance abuse, treatment history, medical history.

The board further proposes to require that the board take into consideration certain factors when determining if the licensee should be required to participate in inpatient, outpatient or other type of treatment. These factors, include, but are not limited to, license type, licensee's history, length of sobriety, scope and pattern of substance abuse, treatment history, medical history, current medical condition.

Discussion

Because of the complexity of an addictive disease, professional substance abuse evaluations are needed to assist the board in making informed decisions regarding a licensee. An evaluation by a professional experienced in substance abuse and approved by the board can provide valuable information to assist the board in evaluating a case. The board needs the opinion of professional evaluators to help it determine the possible basis for the identified behavior. Many individuals who have

substance abuse issues also have other mental health problems/diagnoses. The evaluator can present recommendations for a therapeutic plan. Any disciplinary action should be based on the behavior and the resulting harm or risk of harm. Treatment recommendations may be incorporated into a contract or board order as elements for monitoring or criteria toward re-entry requirements.

By specifying that the board be provided with expert recommendations for treatment and practice restrictions, the standard also ensures that licensees who have undergone treatment and have made steps towards recovery can safely return to practice

The board has statutory authority over licensees and a mandate to protect the public; however, the board's ability to remove licensees immediately from the work place is limited. There are requirements of due process, which require clear and convincing evidence in some cases, the preponderance of evidence, or proof of immediate, imminent danger to the public in others. These requirements are necessary in order for the board to legitimately, prevent someone from practicing in the livelihood for which they are licensed. In some cases an Interim Suspension Order (ISO), Temporary Suspension Order (TSO), or Penal Code 23 (PC 23) is required. The ISO and TSO have a tendency to be expensive, labor intensive, and require time to process. These are part of a disciplinary process and are usually temporary until an accusation is filed and a decision rendered. The PC 23 is the result of criminal action taking place and allows for suspension of the license based on criminal filings. In each case, the cause for the suspension must be proven or found, and there must be sufficient evidence to warrant the action. The ability of any licensing agency to have the financial means to issue hundreds of orders based on complaints alone without legitimate, legally authorized investigations is unrealistic, and would be met with opposition from every area of the professional landscape: licensees, associations, attorneys, public advocates, etc.

The value added to the program is the ability to quickly intervene when a licensee is presented as having a substance abuse issue whether or not there is sufficient evidence to warrant an ISO, or TSO.

3. Work Site Monitor Requirements

In order to comply with the SB 1441 uniform standards, the board proposes that if the board determines that a worksite monitor is necessary for a particular licensee, the worksite monitor (monitor) must meet specified requirements to be considered for approval by the board. These requirements include, but are not limited to, (1) no current or former financial, personal or familial relationship with the licensee or other relationships that could reasonably be expected to compromise the ability of the monitor

to render impartial and unbiased reports to the board; (2) have an active unrestricted license with no disciplinary action within the last five (5) years; (3) adhere to specified methods of monitoring the licensee.

In addition, the board proposes to require reporting requirements of the monitor as follows:

- Any suspected substance abuse must be orally reported to the board and the licensee's employer within one (1) business day of occurrence. If occurrence is not during the board's normal business hours the oral report must be within one (1) hour of the next business day. A written report shall be submitted to the board within 48 hours of occurrence.
- Complete and submit a written report monthly or as directed by the board. The report shall include: the licensee's name; license number; worksite monitor's name and signature; monitor's license number; worksite location(s); dates licensee had face-to-face contact with monitor; worksite staff interviewed, if applicable; attendance report; any change in behavior and/or personal habits; any indicators that can lead to suspected substance abuse.
- Complete the required consent forms and sign an agreement with the monitor and the board to allow the board to communicate with the monitor.

Discussion

As directed in SB 1441, the board is required to establish monitor requirements and standards, including, but not limited to, (1) required qualifications of monitors, (2) required methods of monitoring by monitors, and (3) required reporting by monitors. The monitor's role is to monitor a licensee who is chemically impaired and to ensure that the license is not abusing drugs and/or alcohol. The monitor is also responsible for reporting to the board whether patient safety may be at risk and any change in the licensee's behavior that may be cause for suspected substance abuse.

The monitor should not have any financial or personal relationship with the licensee. This will ensure that the monitor is providing impartial evaluations. The provision that allows the board to waive this requirement is due to the fact that some licensees may only have available to them a monitor who is their employer. The board will review these types of situations on a case-by-case basis. It is also important that the monitor be a health care professional but that he or she did not have to be of the same profession, as this may not be manageable in a hospital setting if the manager of the department is of a different profession.

Frequent face-to-face contact with the licensee is important in order to assess the licensee's appearance, eye contact, and behavior. The monitor needs to interview the staff in the office on the licensee's behavior and review the attendance records in order to adequately report to the board the licensee's overall performance.

The reporting criteria would identify a timeline for reporting to the board of possible substance abuse by the licensee, what information must be included in the monitor

report, and the timeline the report is to be submitted to the board.

Also, included in the standard is language to require the licensee and monitor to sign and submit the required consent forms and affirmations in order for the board to communicate with the monitor.

Implementing this standard would provide (1) ongoing documentation of the licensee's behavior and would ensure the public's safety and (2) immediate notification to the board if a licensee is suspected of working under the influence of drugs and/or alcohol.

4. Test Positive for Banned Substance(s).

In order to comply with the SB 1441 uniform standards, the board proposes to require that it (1) suspend a licensee's license if he/she tests positive for a banned substance, (2) immediately contact the licensee and inform him/her that his/her license has been suspended and that he/she may not practice until the suspension is lifted. The board would also be required to immediately notify the licensee's employer that the licensee's license has been automatically suspended and that he/she may not practice until the suspension is lifted.

Discussion

Protection of the public is the highest priority of the board in exercising its licensing, regulatory and disciplinary functions. In order to carry out this mandate, it is appropriate for the board to suspend a licensee's license if he/she tests positive for a banned substance until he/she has been assessed and the results interpreted.

5. Major and Minor Violations.

In order to comply with the SB 1441 uniform standards, the board proposes to include the following definitions for major and minor violations:

Major Violations include, but are not limited to, the following:

1. Failure to complete a board-ordered program;
2. Failure to undergo a required clinical diagnostic evaluation;
3. Committing multiple minor violations of probation conditions and terms;
4. Treating a patient while under the influence of drugs or alcohol;
5. Committing any drug or alcohol offense that is a violation of the Business and Professions Code, or other state or federal law;
6. Failure to obtain biological testing for substance abuse when ordered;
7. Testing positive for a banned substance;
8. Knowingly using, making, altering or possessing any object or product in such a way as to defraud a drug test designed to detect the presence of alcohol or a controlled substance.

If a licensee commits a major violation, the board would be required to automatically suspend the licensee's license and refer the matter for disciplinary action or other action as determined by the board.

Minor Violations include, but are not limited to, the following:

1. Failure to submit required documentation in a timely manner;
2. Unexcused attendance at required meetings;
3. Failure to contact a monitor as required;
4. Any other violations that do not present an immediate threat to the licensee or to the public.

If a licensee commits a minor violation, the board would be required to determine what action is appropriate.

Discussion

Protection of the public is the highest priority of the board in exercising its licensing, regulatory and disciplinary functions. The board protects the public through its Practice Act, regulations and related statutes. Major violations would result in consequences that would be the maximum allowed by current law under the board's Practice Act and regulations. Minor violations would result in consequences determined appropriate by the board, i.e., increased biological testing, increased meeting attendance.

6. Drug Testing Standards.

In order to comply with the SB 1441 uniform standards, the board proposes to include the following uniform standard for drug testing:

1. Licensees shall be randomly drug tested at least 104 times per year for the first year of probation, and at any time as directed by the Board. After the first year, practicing licensees, shall be randomly drug tested at least 50 times per year, and at any time as directed by the board.
2. Drug testing may be required on any day, including weekends and holidays.
3. Except as directed, the scheduling of drug tests shall be done on a random basis, preferably by a computer program.
4. Licensees shall be required to make daily contact as directed to determine if drug testing is required.
5. Licensees shall be drug tested on the date of notification as directed by the board.

6. Specimen collectors must either be certified by the Drug and Alcohol Testing Industry Association or have completed the training required to serve as a collector for the U.S. Department of Transportation.
7. Specimen collectors shall adhere to the current U.S. Department of Transportation Specimen Collection Guidelines.
8. Testing locations shall comply with the Urine Specimen Collection Guidelines published by the U.S. Department of Transportation, regardless of the type of test administered.
9. Collection of specimens shall be observed.
10. Prior to vacation or absence, alternative drug testing location(s) must be approved by the board.
11. Laboratories shall be certified and accredited by the U.S. Department of Health and Human Services.

A collection site would be required to submit a specimen to the laboratory within one (1) business day of receipt. A chain of custody would be used on all specimens. The laboratory would be required to process results and provide legally defensible test results within seven (7) days of receipt of the specimen and notify the board of nonnegative test results within one (1) business day and of negative test results within seven (7) business days.

Discussion

Many of the standards specific to testing collection and specimen handling are consistent with or based upon the guidelines established by the U.S. Department of Transportation.

Requiring the certification of laboratories through the National Laboratories Certification Program ensures consistent handling and processing of test results. The minimum number of tests provided will help to identify relapse and allow for licensees to be randomly tested.

Requiring a licensee to submit a specimen on the same day as directed will eliminate the ability of a licensee to "flush" their system overnight. Further, the established certification of the laboratory will include creatine and pH levels, which can be a sign of a licensee "flushing" their system. Further, the standard is broad enough to allow the

Disciplinary Guidelines

I. Introduction

Clarify that except as provided for in the Uniform Standards, individual case may warrant a departure from the guidelines.

Condition 1 – OBEY ALL LAWS

Include "all rules and regulations and laws pertaining to the practice of nursing in this state."

Specific purpose:

This section mandates that if a licensee is convicted of any violation of the law during the probation period, the licensee must disclose that fact to the board, in writing, within seventy two (72) hours. With this inclusion, it will require that any NPA violations are required to be reported and that any other action violating the Nursing Practice Act (NPA) may result in a violation of probation and may be actionable with further discipline up to revocation. This is necessary for consumer protection and enforcement of the NPA.

Rationale:

It is the responsibility of all licensees to be lawful. The board must ensure that the respondent clearly understands that all violations of any law must be reported to the board and that the respondent must comply with criminal penalties while on probation. To include the NPA as part of law, will ensure that the respondent is aware such rules and regulations can be imposed and regulated.

Condition 4 – RESIDENCY, PRACTICE, OR LICENSURE OUTSIDE OF STATE

Include "The respondent shall at all times maintain an active, current license status with the California Board of Nursing while on tolled status. Upon re-establishing residency in California respondent shall submit completed fingerprint forms and fingerprint fees as directed by the board."

Specific purpose:

This ensures that respondent may not complete probation without being fully monitored for their term while residing in California. Requiring the licensee to remain active, will give the board the most accurate contact information while residing outside the state of California.

Rationale:

Requiring the licensee to remain active, will give the board the most accurate contact information while residing outside the state

The fingerprint requirement upon return to California will allow the board to acquire any criminal activity nationwide through Department of Justice (DOJ) and Federal Bureau of Investigation (FBI).

It will ensure that while the licensee was in a tolled status, if there was any unlawful activity, the board could take additional disciplinary action.

Condition 6 – FUNCTION AS A REGISTERED NURSE

Remove “and if no other conditions have been violated”

Specific purpose:

This provides the board with an opportunity to monitor the respondent and determine if he/she can perform the functions and duties of a registered nurse in a competent manner. It also prevents the respondent from merely “sitting out”: the probation and avoiding the necessity of demonstrating competence and complying with nursing practice related probation conditions.

Rationale:

By removing this statement from the condition, it gives more authority to extend probation with violations that don't warrant further discipline through the Attorney General's

Condition 7- EMPLOYMENT APPROVAL AND REPORTING REQUIREMENTS

Include “The board may rescind the employment approval for unsatisfactory job performance or any probation violation.

Include “The respondent authorizes the board and the employers and supervisors to communicate regarding the respondent's work status, performance, and monitoring.

Include “Respondent shall provide a copy of this accusation and decision to his or her employer”

Specific purpose:

This condition allows the board to determine the appropriateness of a setting for which the respondent will be providing registered nursing services and to obtain reports relative to the respondent's registered nursing competency.

This condition additionally allows the board to be informed of any employment, termination, or separation of the respondent from a nursing or other health care related position, e.g. as a licensed vocational nurse, respiratory therapist, certified nursing assistant or home health aide. It includes reporting of employment in health care related services not regulated by the state, e.g., surgical technician or cardiac catheterization technician.

The condition also provides the board with a mechanism for ensuring that the employer providing nursing or other health care related services is informed of the license status of the respondent so that, if necessary, the work environment can be structured to ensure consumer safety.

Rationale:

By including a rescind clause within the language, it gives us the authority to cease employment immediately, should the nurse exhibit work habits that would be unsafe for patients or if they have a violation of any of the probation conditions as set forth in their Decision.

By enabling the board to communicate with employers, information can be shared that may keep patients from any potential danger. This will also allow the board to monitor the nurse at a closer level to ensure that any behavioral inconsistencies are addressed in a timely manner.

By giving the employer the accusation, this enable to employer to have the details of the underlying situation, which resulted in the nurses license being placed on probation. It will also assist the employer in being cognizant of any alerting signs that would possibly arise during their shift that would need to be reported to the board.

Condition 8- SUPERVISION

Remove the option of "Home Health Care" and replace with "Other"

Specific purpose:

This allows the board to require appropriate supervision and/or collaboration, to monitor the respondent's registered or advanced practice nursing competency and thus protect consumer safety. The level of supervision or need for advanced practice collaboration will be determined by the board at probation meetings.

Rationale:

This change will allow the board to encompass all work environments not covered by maximum, moderate or minimum as opposed to only compensating for the Home Health Care field.

Condition 10 – COMPLETE A NURSING COURSE(S)

Edit first paragraph to read:

Respondent, at his or her own expense, shall enroll, within six months of the effective date, and successfully complete a course(s) relevant to the practice of registered nursing, prior to the end of the probationary term.

Specific purpose:

This condition permits the board to require the respondent to remediate deficiencies in knowledge which affected or may affect his/her practice of registered nursing. This is necessary in gross negligence or incompetence as well as alcohol / drug abuse cases.

Rationale:

In requiring the nurse to enroll and complete a course relevant to nursing within 6 months from the effective date ensures that the nurse has taken the remedial education required as part of their probation within a timely manner. Currently the nurse has two and half (2.5) years to complete any assigned courses assigned by the board.

Condition 11 – COST RECOVERY

Edit condition to read:

Respondent shall pay to the board costs associated with its investigation and enforcement pursuant to Business and Professions Code Section 125.3 in the amount of \$____. Respondent **may** be permitted to pay these costs in a payment plan approved by the board, with payments to be completed no later than three months prior to the end of the probation term.

Remove from second paragraph "if no other conditions have been violated"

Specific purpose:

To ensure that any costs associated with the legal process of disciplining a nursing license is repaid by the nurse during the probationary period assigned by the board.

Rationale:

Changing the language from "shall" to "may" infers that the nurse has the option to make payments to repay the amount in full, if approved by the board. This still allows for the amount to be paid in full 3 months prior to the end of the probation term regardless of a payment plan being put in place.

By removing this statement from the condition, it gives more authority to extend probation with violations that don't warrant further discipline through the Attorney General's

Underlying Data

1. Uniform Standards Regarding Substance-Abusing – Healing Arts Licensees, April 2010
2. Board of Registered Nursing Uniform Standards Related to Substance Abuse and Disciplinary Guidelines (Revised February 2011)

Business Impact

The board does not believe that this regulation will have a significant adverse economic impact on businesses as it only affects individuals and those businesses that are disciplined for serious violations of the California Code of Regulation or California Business and Professions Code.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No other alternative could be considered since promulgation of these regulations is required by SB 1441.

ESTIMATED COST: SB 1441 specified that the diversion program responsibilities imposed on licensing boards under its provisions will be absorbed into the current operating expenses of the boards.